IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1310 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BHARAT DOLATRAM BHUJWANI - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AD SHAH for Applicant(s) : 1,
MR AD OZA, PUBLIC PROSECUTOR for Respondent(s) : 1,
MR SV RAJU for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/09/2005

ORAL JUDGMENT

1.The petitioner has filed this petition under Article 226 & 227 of the Constitution of India and also under Section 482 of the Criminal Procedure Code, 1973 praying for quashing and setting aside the order of the Special Judge in taking cognizance by directing registering the Charge-sheet as Special Case No. 6/2004. The petitioner has also prayed for quashing and setting aside the Charge-sheet filed by the Investigating Officer, CID Crime, Vadodara Zone, against the petitioner accused, declaring him in Column No. 2 as 'absconding accused'. The petitioner has further prayed for the direction to the Investigating Agency to submit the report before the appropriate Court for further proceedings to be initiated in compliance with the provisions of Section 340 and 195 of the Cr.P.C. The petitioner has also prayed for stay against the further proceedings of Special Case No. 6/2004 during the pendency of this petition. Similarly, the petitioner has prayed for quashing and setting aside the order issuing

Warrant under Section 70 of the Cr.P.C. In Cri. Misc. Application No. 831 of 2004 on 04.09.2004 and also prayed for stay against the implementation and execution of the Warrant directed to be issued by the Special Court on 04.09.2004.

2.Mr. A.D. Shah, learned advocate appearing for the petitioner has submitted that CID Crime, Vadodara Zone registered offence as CR No. I-1 of 1995 for the offences under Sections 389, 348, 409, 465, 466, 468, 471, 474, 419, 411, 109, 114, 115, 119, 120B, 167, 182, 193, 195, 196, 199, 200, 205, 209, 211, 219, 220 and 506 (1) of the Indian Penal Code as well as Section 7, 13(1)(d) read with 13 (2) of the Prevention of Corruption Act, 1988. The Investigating Agency has filed the Charge-sheet on 27.04.2004 and the learned Special Judge registered the same as Special Case No. 6 of 2004. Mr. Shah has further submitted that the Investigating Officer submitted an application against the absconding accused for issuance of Warrant under Section 70 of Cr.P.C. on 05.07.2004 which was

numbered as Cri. Application No. 929 of 2004 and the learned Special Judge has directed to issue Non-bailable arrest Warrant on 04.09.2004 which would be operative for three months.

3.In the above background of the matter, the present petition was filed challenging the action of the Special Judge in taking cognizance of the offences against petitioner. Mr. Shah has further submitted that in view of the provisions contained in Section 340 read with Section 195 of Cr.P.C., the learned Special Judge has no power or authority to take cognizance of the said offence. He has further submitted that the only Court in which the offence was committed has the power to file the complaint and after following the procedure prescribed under Section 340 of Cr.P.C., the cognizance could be taken.

4.In support of his submissions, he relied on the decision of the Lahore High Court in the case of **Mohammedkhan, S/o. Nurhassan V/s. Emperor, reported**

in AIR (31) 1944 Lahore 328 wherein it is held that the power to detain in custody or to put on bail accrues to the complainant Court under Section 476 only when, it has recorded its finding and decided to make a complaint. Therefore, before a final order that a complaint should be made the question whether the offence is bailable or non-bailable does not arise because the Court has no power either to confine or to put on bail. Therefore, where the Court before finally deciding to make a complaint under Section 476 orders that the accused should remain in the judicial lock-up, the proper application would be under Section 491 for release of the accused from custody and not under Section 498 for release on bail because the Court has no power at this stage to grant bail.

5.Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of **Santokh Singh V/s. Izhar Hussain and another, AIR 1973 SUPREME COURT 2190** wherein the Court has observed that every incorrect or false statement does not make it

incumbent on the Court to order prosecution. The Court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The Court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the Court should direct prosecution. The Court has further observed that it was either the Court which tried the original offences or a court to which the trial Court was subordinate that could make such an order. The Court of the Additional District Magistrate would not seem to be subordinate to the High Court as provided by Section 195 (3), Cr.P.C. The Court has further observed that at best, if it considered the orders of the two Courts below tainted with a serious legal infirmity or manifest error resulting in

grave miscarriage of justice, it could have after quashing those orders sent the case back to the trial Court for reconsideration of the matter in accordance with law.

6.Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of **M. Narayandas V/S. State of Karnataka and others, 2004 S.C.C. (Cri.) 118** wherein it is observed that Sections 195 and 340 do not control or circumscribe the power of the police to investigate under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However, that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340 of the Criminal Procedure Code is followed.

7.On the basis of the aforesaid judgments, Mr. Shah has submitted that the learned Special Judge has

taken cognizance on Charge-sheet for the various offences committed in pursuance to the alleged conspiracy during the period commencing from December 1993 to 3rd February 1995 without being followed any procedure as laid down in Section 340 and without the concerned Court filing a complaint for the said offences. He has, therefore, submitted that the learned Special Judge, Vadodara, could not have directed Charge-sheet be registered in the relevant Case Register and numbered the same as Special Case No. 6 of 2004 on 27.04.2004. The embargo of Section 195 is clearly attracted and in absence of any complaint, the cognizance for the said offence is absolutely illegal. Mr. Shah has, therefore, submitted that though no complaint is yet filed by following procedure under Sections 195 & 340 of Cr.P.C., the I.O. of C.I.D. (Crime) under the guise of investigation, submitted an application for arrest warrant. The provisions of Section 195 clearly contemplates that the only mode of taking cognizance by the Court for the offences covered by the provisions under Section 195 is on

filing of the complaint and not otherwise. Thus, though the offences are cognizable, as the same are alleged to have been committed in respect to the judicial proceedings pending before the Court, that is to say, the offences are in respect to the administration of justice, it is the concerned Court who has to come to the conclusion of the commission of the alleged offences by the accused and further reach the satisfaction that if it is expedient in the interest of justice that such accused should be prosecuted and for that the Court direct to file the complaint. Once such complaint is filed, it is the concerned Court who decides to take cognizance of the offences and to decide what process should be issued, whether the process of summons or bailable warrant or non-bailable warrant. Thus, as per the entire Scheme, in respect to the offences covered by Section 195 & 340 of Cr.P.C., the Police Officer has to submit the Report of Investigation before the concerned Court and it is the function of the said Court to deal with the accused. Mr. Shah has further

submitted that the I.O. is exercising power of arrest though the concerned Court, which has to decide about the commission of the offence and necessity to initiate proceedings by filing complaint, has not even applied mind what should be the process. All these proceedings, by way of arrest and remand to police as well as judicial custody, clearly tantamount to the abuse of process of the Court, and, more particularly, in violation of statutory provisions of the Code of Criminal Procedure which clearly prohibits taking cognizance of the offences on Charge-sheet.

8.Mr. Shah has alternatively submitted that similar issue is raised before the Hon'ble Supreme Court by other Co-accused in their respective cases and the same are pending and hearing is fixed on 19.09.2005. The Court should, therefore, adjourn the hearing till the Hon'ble Supreme Court decides this very issue in the pending matter.

9.Mr. A.D. Oza, learned Public Prosecutor appearing

for the State has strongly objected to the request of adjournment. He has submitted that so far as the present petitioner is concerned, he is absconding since long. He has not appeared before the Investigating Officer despite Warrants being issued. Qua the petitioner, the investigation is yet not over. Mr. Oza has, therefore, submitted that the provisions under Section 195 of the Cr.P.C. would not apply and hence, the procedure laid down under Section 340 of Cr.P.C. is not required to be followed. He has further submitted that complaint filed by CID, Crime, Vadodara Zone on 03.02.1995 being C.R. No. I-1/1995 was challenged before this Court and the same was quashed and set aside. The said order quashing and setting aside the complaint was challenged before the Hon'ble Supreme Court. While setting aside the order of this Court and dealing with the petition filed by way of public interest litigation, the Hon'ble Supreme Court has observed in the case of **Manohar M. Galani V/s. Ashok N. Advani and another, [2000] 41 (3) G.L.R. 2655** that so far as the

public interest petition is concerned, not only the Counsel for both sides agreed that the same ought not to have been set aside. The Hon'ble Supreme Court, however, expressed its displeasure about the exercise of powers by the High Court under extraordinary jurisdiction to interfere with a collateral proceeding initiated by the High Court itself in an application filed in public interest. There cannot be any dispute that the facts revealed a serious scandal in the functioning of some subordinate Court in the State of Gujarat, and, therefore, the High Court took cognizance of the matter and directed inquiry to be conducted and on the basis of the said inquiry, it was open for the High Court to issue necessary directions and at that stage, the impugned order has emanated. In the opinion of the Hon'ble Supreme Court, the order in the impugned judgment setting aside the aforesaid public interest petition was erroneous and the Court, therefore, set aside the said order and directed that the public interest petition should be considered by the High Court on merits on

the basis of the reports submitted to the Court and appropriate directions be given whatever the Court thinks fit. The Court has further observed that so far as the quashing of the complaints and inquiry on the basis of F.I.R. registered by the complainant are concerned, the Court found that the High Court was not justified in interfering with the same and quashing the proceedings by an elaborate discussion on the merits of the matter and in coming to the conclusion that Section 195 of the Code of Criminal Procedure will be a bar. It was rather premature for the High Court to come to the aforesaid conclusion and on account of the orders passed, the investigation into several serious allegations were being throttled. The Court has, therefore, quashed and set aside the order quashing the complaint and investigation made thereunder and directed that those cases may be proceeded in accordance with law.

10.Mr. Oza has further submitted that pursuant to the said order of the Hon'ble Supreme Court, petition

dealing with public interest litigation was heard and disposed of by the Division Bench of this Court in the case of **Ajit D. Padiwal V/s. State of Gujarat and another, [2005] 46 (1) G.L.R. 743** wherein certain directions were issued by the Court. The directions issued vide para 118 (A) & (B) are relevant for the present purpose. They are as under :-

*"**[A]** In our view, the first direction which we are required to give is to the Court, namely, to the learned Special Judge, Vadodara, before whom the Investigating Officer has filed Charge-sheet in respect of investigation carried out vide C.R. No. 1 of 1995 against some of the accused, who are arrested. Inspite of filing Charge-sheet, the Court has not proceeded further except by extending the remand period from time to time. Accordingly, it will be in the interest of justice to direct the Special Judge, Vadodara to immediately consider the papers of Charge-sheet and consider about the material found in the Charge-sheet and to apply his mind about the question of bar of Section 195 of the Cr.P.C. and consider whether it will be within his power and jurisdiction to pass orders and if he is unable to take cognizance under the I.P.C. as the same are covered under the bar of Section 195 of the Cr.P.C., the Court may consider in respect of offence under the Prevention of Corruption Act against those accused against whom the charge was framed, who are public servants and whether the charge for the offence under the Prevention of Corruption Act can be framed against those accused persons, who are public servants. The learned Special Judge shall accordingly immediately decide and pass order within 4 weeks. If the learned*

Special Judge decides that it is not permissible for him to take cognizance insofar as offences under the I.P.C. are concerned, in view of specific bar of Section 195 of the Cr.P.C., he shall immediately forward the copy of the papers of the Charge-sheet to the respective Courts where these offences have been committed. After the order is passed by the learned Special Judge, Vadodara, as aforesaid, and the papers of Charge-sheet is forwarded to the concerned Court, in which the cases were filed, the concerned Magistrate, as soon as it receives the Charge-sheet papers from the learned Special Judge, shall immediately proceed to consider whether it would be expedient in the interest of justice that inquiry should be made to the offence with which the accused has been charged in the Charge-sheet i.e. for the offence referred in Clause (b) of Section 195 of the Cr.P.C. by giving priority to this case, and see that the same is complied in accordance with law within four weeks of the papers of the Charge-sheet received by the respective Courts.

[B] *In view of the above direction given by this Court, it is also necessary that the concerned Court shall report about the steps being taken by them in the matter to the Registry of this Court and in turn such report received from the concerned Court will be placed before us. In light of the fact that the Charge-sheet is filed by the police in respect of the offences registered vide C.R. NO. 1 of 1995 and the investigation papers of that case reveal that it pertains to different criminal cases registered at different Courts in Gujarat filed against Manhar Galani and others, it will be necessary to direct the Investigating Agency that the material collected in respect of each criminal case, which has been filed in different Courts against Manhar Galani, be separated and the said material from the Charge-sheet is to be forwarded to the concerned Court to facilitate the concerned Court to decide the matter. The records and*

proceedings of 10 different cases filed in different Courts against Manhar Galani and his family members are preserved under custody of this Court and the details of the said 10 cases are as under :-

(1) Criminal Case No. 1099 of 1993 filed in the Court of J.M.F.C, Dakor, Dist. Kheda.

(2) Criminal Case No. 337 of 1999 filed in the Court of J.M.F.C, Padra, Dist. Vadodara.

(3) M Case No. 11 of 1994 filed in the Court of J.M.F.C, Dabhoi, Dist. Vadodara.

(4) Enquiry Case No. 3 of 1994 and Criminal Case No. 368 of 1994 filed in the Court of J.M.F.C, Jamkhambhalia, Dist. Jamnagar.

(5) Enquiry Case No. 6 of 1994 filed in the Court of J.M.F.C., Bajwa, Court No. 4.

(6) Enquiry Case No. 3 of 1994 filed in the Court of J.M.F.C., Municipal Court, Makarpura, Baroda.

(7) Criminal Case No. 102 of 1999 filed in the Court of J.M.F.C, Borsad.

(8) Criminal Case No. 704 of 1999 filed in the Court of J.M.F.C, Dabhoi, Dist. Vadodara.

(9) Summary Suit No. 67 of 1994 filed in the

Court of 3rd Joint Civil Judge, Vadodara.

(10) Criminal Case No. 288 of 1999 filed in the 18th Court of Metropolitan Magistrate, Mirzapur, Ahmedabad.

The record and proceedings of the aforesaid cases are ordered to be transmitted to the respective Courts and the Registry of this Court is accordingly directed that while transmitting all those cases to the respectively Courts in Gujarat, the zerox copy of each document of each case is to be taken out and preserved separately and see that the record and proceedings reaches to the respective Court safely and the respective Court be also informed that all the record and proceedings of respective Courts are required to be preserved in safe-custody and to see that the said record is not mishandled or tampered with."

11.Mr. Oza has further submitted that even as per the aforesaid directions, the Court has made it very clear that the said directions are issued to the learned Special Judge. However, Investigating Officer has filed Charge-sheet in respect of investigation carried out vide C.R. NO. I-1/1995 against some of the accused who are arrested. In the present case, the petitioner is not arrested and investigation qua the petitioner is also not

over. Even otherwise, these directions were stayed by the Hon'ble Supreme Court vide its interim order dated 13.05.2005 passed in Special Leave to Appeal (Civil)_____/2005 (CC 5627/2005) wherein the Hon'ble Supreme Court has observed that in the meanwhile, there will be stay of directions of the High Court as contained at Serial Nos. (A) and (B) of the main judgment and similar directions in the concurring judgment. Further, the Court made it clear that in respect of Complaint Case No. 1 of 1995 pending before the Special Judge, Baroda, there is no stay and that Court can proceed with the said case.

12.In view of the aforesaid interim order of the Hon'ble Supreme Court, Mr. Oza has submitted that there is no question of staying further proceedings and no relief which is prayed for in the present petition should be granted. He has further submitted that another co-accused, namely, Manohar K. Keshwani has also field petition before this Court being Special Criminal Application No. 303 of

2005 and all the contentions which are raised in the present petition were also raised in that petition and after arguments, the said petition was withdrawn. While allowing the petitioner to withdraw the said petition on 09.08.2005, this Court (Coram :- Jayant Patel, J.) has observed that the matter was argued at length and when the Court was inclined to reject the petition on various aspects, at that stage, Mr. Shah, learned counsel for the petitioner submitted that the petitioner may be permitted to withdraw the petition since the matter is pending before the Apex Court and as the Apex Court is seized with the matter. Considering the facts and circumstances, permission was granted and the petition was rejected as withdrawn.

13.Mr. Oza has further submitted that the issue raised by the petitioner in the present petition was also considered by this Court in Cri. Misc. Application No. 4934 of 2004 with Cri. Misc. Application No. 6052 of 2004. While rejecting the said two applications, this Court vide its order

dated 12.08.2004 has observed that on the basis of the aforesaid two judgments of the Hon'ble Supreme Court, the Court is of the view that since the police report in the form of Charge-sheet qua the applicants is still not filed and investigation is yet not completed, the Investigating Officer's power to arrest or to seek the custodial interrogation is not affected by the provisions contained in Section 195 (1)(b) of Cr.P.C.

14.In the above view of the matter, Mr. Oza has submitted that no indulgence should be shown by this Court while exercising its extraordinary powers under Article 226 & 227 of the Constitution of India or under Section 482 of Cr.P.C. and the petition be dismissed.

15.After having heard learned advocate appearing for the petitioner and learned Public Prosecutor for the State and after having considered the fact stated and averments made in the complaint and the decisions relied upon by the respective parties,

the Court is of the view that looking to the facts and circumstances of the case, no indulgence is required to be shown in the matter. Admittedly, the petitioner is absconder. Though the complaint is filed in 1995 and more than 10 years have gone, still the investigation qua the petitioner is not over and the petitioner is not co-operating to the Investigating Agency and is avoiding his arrest during all this period. It is settled proposition in law that a person must come with clean hands. On the one hand, the petitioner is not co-operating to the Investigating Agency and on the other hand, the petitioner is challenging the action taken by the Investigating Agency by raising the legal dispute before this Court. It is true that there is an embargo in Section 195 and if the said section is applied, in that case, the procedure laid down under Section 340 of the Cr.P.C. should be strictly followed. But the real question is as to whether the provisions of Section 195 is applicable or not. In the present case, the Charge-sheet is filed by registering the offence

under different Sections. Those sections could not be covered by the provisions contained in Section 195 of the Code and hence, it is at this stage premature to state as to whether the said provision is applicable or not. Even otherwise, the Hon'ble Supreme Court has made it very clear that the investigation must proceed and no stay has been granted against investigation. As a part of the said investigation, the presence of the petitioner is required and since he has not responded to the Investigating Agency, it is not open for the present petitioner to challenge the action of the Investigating Agency on the ground that the Special Court has no power or authority to take cognizance and to submit that the Court has no authority to take cognizance and the Investigating Agency cannot issue the arrest warrant.

16.This very issue has been challenged before this Court and when the Court was about to reject the said petition, the said petition was withdrawn. Even in the proceedings asking for anticipatory

bail, the Court has dealt with in detail the issue regarding the applicability of the provisions contained in Section 195 & 340 and the Court has taken the view that if the investigation is not over qua the particular accused, it cannot be said that the embargo laid down in Section 195 (5) can be applied. Here in the present case also, since the petitioner has not appeared and is absconder, there is no question of applying the procedure of Section 195 of Cr.P.C. nor there is any question of complying with the procedure laid down in Section 340 of Cr.P.C. Even otherwise, the directions issued by the Division Bench of this Court as referred to above have been stayed by the Hon'ble Supreme Court by an interim order and refused to grant any stay against further investigation. Since the issuance of Warrant by the Investigating Agency is a part and parcel of the further investigation in the matter and there is no stay against such investigation, the Court is not inclined to grant the relief prayed for in the present petition.

17.In the above view of the matter, the Court does not think it fit and proper to exercise its extraordinary, prerogative writ jurisdiction or to exercise its inherent powers under Article 226 & 227 of the Constitution of India or under Section 482 of the Cr.P.C. and to grant the relief prayed for in the present petition. Since the petition does not deserve any reliefs which are prayed for in the petition, the petition is summarily dismissed.

[K.A. PUJ, J.]

Savariya